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In The

Supreme Court of the United States

KEY PHARMACEUTICALS, SCHERING-PLOUGH CORPORATION AND SCHERING CORPORATION,

Petitioners,

v.

FREDERICK D. EDWARDS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The Oregon Court Of Appeals

BRIEF FOR ASSOCIATED OREGON INDUSTRIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Associated Oregon Industries ("AOI") was established in 1895 as an organization to promote Oregon products. Today, AOI is a nonprofit statewide business and lobbying organization representing over 2,400 principal members and 16,000 associate businesses. Its member businesses employ approximately 30 percent of Oregon's entire private workforce.

AOI members are companies and individuals interested in Oregon business issues. AOI membership reflects the diversity of Oregon business, from small start-up companies to some of the state's largest employers, spanning every county in the state. AOI represents its members before the Oregon Legislature, in courts of law, and before state rule-making agencies in areas such as education, employment, energy deregulation, environment, health care, natural resources, retail, taxation, transportation, workplace safety and workers' compensation. Because AOI addresses broad-based business issues, it does not generally become involved in issues affecting only a specific aspect of an industry.

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[1] In accordance with Rule 37.2(a) of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent, accompanying this brief, have been filed with the Clerk of the Court. In accordance with Rule 37.6 of the Rules of this Court, *amicus* states that counsel for the petitioners participated in the authorship of this brief. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation or submission of the brief. Petitioner is an associate member of Associated Oregon Industries.

The members of AOI have no single viewpoint regarding the regulation of the pharmaceutical industry, and AOI takes no position as to the propriety or legality of the petitioners' conduct. However, AOI and its members are profoundly concerned about the refusal of Oregon courts to provide meaningful review of punitive damages awarded by juries. AOI believes that the rational juror standard for review of punitive damages adopted by the Oregon Supreme Court is directly inconsistent with the constitutional standards announced by this Court. The application of that standard by state courts in Oregon deprives litigants of meaningful judicial review of punitive damages awards. As a result, litigants in Oregon state courts receive less constitutional protection than they currently receive in federal court or in the courts of other states. Unless reined in by this Court, Oregon's continued pattern of affirming every jury's award of punitive damages – no matter how large or disproportionate to the harm caused – will gravely affect virtually every business in Oregon, dampen an already-struggling economy and discourage new business development in our state.

ARGUMENT

I. DESPITE THIS COURT'S DIRECTION IN *OBERG*, OREGON COURTS HAVE FAILED TO PROVIDE ADEQUATE REVIEW OF PUNITIVE DAMAGES AWARDS

Eight years after this Court's decision in *Honda Motor Co., Ltd. v. Oberg*, Oregon remains alone in the nation in its excessive deference to the jury when conducting appellate review of punitive damages awards. As this Court aptly noted in *Oberg*, "[t]here is a dramatic difference

between the judicial review of punitive damages awards under the common law and the scope of review available in Oregon." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 426 (1994) (*Oberg* (federal)). That observation still holds true, despite the guidance provided by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) on the scope and nature of appellate review of punitive damages required by the federal Constitution. Rather than provide constitutionally adequate review of punitive damages awarded by Oregon juries, Oregon exhibits stubborn allegiance to a "rational juror" standard of review – a sufficiency of the evidence standard that appropriately has been rejected by this Court as inadequate under the principles of due process of law. *See TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456 (1993) (rational basis review of punitive damages awards insufficient).

In *TXO*, this Court explained why a rational basis standard for review of punitive damages awards is constitutionally insufficient: "Under respondents' rational basis standard, apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable." *TXO*, 509 U.S. at 456 (emphasis in original). The Court's hypothetical concern has become a reality in Oregon. Since this Court held that the United States Constitution compelled Oregon to provide judicial review of punitive damages awards, Oregon's appellate courts have considered fourteen cases presenting the issue for decision. As the chart attached to the Petition for Writ of Certiorari demonstrates, 118-a, Oregon appellate courts have affirmed the jury's punitive damages award in thirteen of

those cases. In the fourteenth case, the Court of Appeals significantly remitted the punitive damages, but the Oregon Supreme Court has granted discretionary review to consider, in part, whether the Court of Appeals erred in reducing the jury's punitive damages award. *Jensen v. Medley*, 11 P.3d 678 (Or. Ct. App. 2000), *review allowed*, 52 P.3d 436 (Or. 2002). In four of the cases, the appellate courts reinstated jury verdicts that had been reduced by the trial court. Apart from *Jensen*, *no jury verdict awarding punitive damages has ultimately been reduced by Oregon's appellate courts*. And, given the Oregon Supreme Court's history of affirming a jury's punitive damages award no matter the size, the ultimate result in *Jensen* may well be consistent with this pattern.

Neither the size of the jury's punitive damages verdict nor the extent of its disproportion to actual harm deters Oregon appellate courts from sanctioning the jury's award. In *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001), the Oregon Supreme Court reinstated the jury's punitive damages award, which had been remitted by the Court of Appeals. The Supreme Court concluded that an 87:1 ratio between punitive and compensatory damages awarded solely for economic injury was "within the range that a rational juror would be entitled to award. . . . " 17 P.3d at 490. Shortly thereafter, the Court of Appeals followed the Supreme Court's lead when, in a wrongful death action, it reinstated a jury's punitive damages award that is 97 times the size of the compensatory damages awarded. The Court of Appeals concluded that: "In light of the 87 to 1 ratio in *Parrott*, we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury."

Williams v. Philip Morris Incorporated, 48 P.3d 824, 841 (Or. Ct. App. 2002).

Even the most casual review of the decisions handed down by Oregon appellate courts after *Oberg* should raise this Court's "judicial eyebrows" out of concern over whether litigants in Oregon are receiving the scope and level of review of punitive damages awards mandated by the federal Constitution. A look at the history of punitive damages review in Oregon sheds light on why the Oregon courts have resisted their constitutionally-mandated role to ensure that punitive damages awards comport with federal due process and why the standard of review currently applied by Oregon appellate courts is constitutionally inadequate. The Court should grant the writ of certiorari in this case to ensure that litigants in Oregon courts receive the same due process protection against excessive punitive damages that is provided in federal court and in the courts of other states.

II. OREGON'S "RATIONAL JUROR" STANDARD FOR PUNITIVE DAMAGES REVIEW IS CONSTITUTIONALLY INADEQUATE

A. Prior to *Oberg*, Oregon Courts Held Consistently That the Oregon Constitution Precluded Judicial Review or Modification of the Amount of Punitive Damages Awarded by a Jury.

Oregon's unquestioning loyalty to jury awards of punitive damages has a long history. Since at least 1949, Oregon courts have considered it a violation of the Oregon Constitution for a court to review a jury's determination of the amount of punitive damages. Under the Oregon

Constitution, an Oregon court may not reduce a punitive damages award; it can only overturn the award in its entirety. And the court can set aside an award of punitive damages only if there is no evidence from which a rational jury could conclude that *any* award of punitive damages is warranted. Thus, as a matter of Oregon constitutional law, once it is determined that there is an evidentiary basis for a jury's decision to impose punishment, the jury can award any amount of punitive damages. As a matter of Oregon law, Oregon courts are constitutionally prohibited from considering the rationality or proportionality of a jury's punitive damages award. Whether the jury chooses to award one dollar, or a billion, its decision is untouchable.

This Court's decision in *Oberg* informed the Oregon courts that, regardless of the import of the Oregon Constitution, federal due process requires that Oregon provide "meaningful and adequate review by the trial court and subsequent appellate review" of the amount of a jury's award of punitive damages. *Oberg* (federal), 512 U.S. at 420, 435. But Oregon's complete deference to jury decision making was well entrenched. In the eight years since *Oberg*, Oregon's appellate courts have ensured that, as a practical matter, jury awards of punitive damages remain inviolate.

On remand in *Oberg*, the Oregon Supreme Court fashioned the "rational juror" standard for meeting its federally-mandated responsibility to review punitive damages awards for excessiveness:

> A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a

> rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue.

Oberg v. Honda Motor Co., Ltd., 888 P.2d 8, 10 (Or. 1995) (*Oberg* (state)). In effect, Oregon substituted one sufficiency of the evidence test for another. As is evidenced below, the "rational juror" standard fails to comport with this Court's elucidation of due process requirements for review of jury awards of punitive damages.

B. Appellate Review of Punitive Damages Awards in Oregon After *BMW*.

One year after the Oregon Supreme Court decided *Oberg* on remand, this Court decided *BMW of North America v. Gore*, to "help illuminate the 'character of the standard that will identify unconstitutionally excessive awards' of punitive damages. . . . " *BMW*, 517 U.S. at 568, quoting *Oberg* (federal), 512 U.S. at 420. The Oregon Court of Appeals, at least, seemed to be listening. In 1998, in *Blume v. Fred Meyer*, the Court of Appeals acknowledged that the "rational juror" standard was inherently inconsistent with the standard established in *BMW*:

> Although jury instructions and considerations may, in fact, properly constrain a jury's consideration of punitive damages, we agree with defendant that a reviewing court's determination of whether the punitive damage award is unconstitutionally excessive is not dependent on instructions to the jury or on the jury's consideration. Under *BMW*, although the reviewing court accepts the facts and inferences as the jury found them, evaluating whether a punitive damage

> award is excessive requires examination of, but not deference to, the jury's award.

Blume v. Fred Meyer, Inc., 963 P.2d 700, 706 (Or. Ct. App. 1998).

Over the next three years, the Court of Appeals consistently applied the *BMW* analysis and guideposts, and, in 1999, the appeals court approved the first remittitur of a jury verdict in Oregon history. In *Parrott v. Carr Chevrolet, Inc.*, 965 P.2d 440 (Or. Ct. App. 1998), the defendant was found liable for violating Oregon's Unfair Trade Practices Act by failing to disclose defects in a vehicle and its title and discrepancies in the odometer reading. The jury awarded compensatory damages of $11,496 and punitive damages of $1 million. The trial court remitted the punitive damages award to $50,000, and the Court of Appeals increased the remitted award to $300,000, still 26 times the compensatory damages awarded. The next year, in *Jensen v. Medley*, the Court of Appeals found the jury's $1 million award of punitive damages was unconstitutionally excessive and remitted it to $175,000 – five times the compensatory damages award. *Jensen*, 11 P.3d at 689. It appeared that Oregon courts finally were conducting the sort of meaningful review of punitive damages awards that due process requires. However, the Oregon Supreme Court again intervened to restore the primacy of the jury in deciding the amount of punitive damages.

C. *Parrott* and Its Progeny: The Oregon Supreme Court Resurrects the "Rational Juror" Standard.

In *Parrott v. Carr Chevrolet, Inc.*, the Oregon Supreme Court reaffirmed its stubborn adherence to the "rational

juror" standard. The court held that the "rational juror" standard was "compatible with and does not differ practically from *Gore's* gross excessiveness inquiry, and that *Gore* has not 'superseded' the rational juror standard that this court articulated in *Oberg* (state)." *Parrott*, 17 P.3d at 484. The court concluded that the *BMW* standards announced by this Court were merely "additional factors for the reviewing court in Oregon to consider as part of the *Oberg* (state) rational juror review." *Id.* at 484.

Relying on a provision of the Oregon Constitution different from the one at issue in *Oberg*, the court reiterated that "[i]n Oregon, calculating punitive damages is the function of the jury," *id.*:

> Although the federal requirement of judicial review for excessiveness directly conflicts with the re-examination clause of Article VII (Amended), section 3, of the Oregon Constitution, that requirement has not altered the parties' right, under Article I, section 17, of the Oregon Constitution to a trial by jury regarding a claim for punitive damages. As is true in other contexts, the proper response of an Oregon court to the overlapping and potentially conflicting requirements of federal and state constitutional law is to give effect, to the greatest extent possible, to *all* pertinent constitutional requirements. . . .
>
> Accordingly, because the amount necessary to punish what has occurred and deter its repetition is a question for the jury, we hold that, when reviewing a punitive damages award for excessiveness, the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them.

Id. at 485 (emphasis in original). As a result, the Oregon court reiterated that punitive damages review in Oregon required nearly unquestioning deference to the jury, and returned to its earlier pattern of affirming a jury's punitive damages award if "a jury could have found" that the punitive damages award was warranted.

D. The "Rational Juror" Standard Conflicts With *BMW* and *Cooper Industries*.

Today, as 50 years ago, the Oregon Supreme Court's approach to excessiveness review is driven by its conclusion that an award of punitive damages is a fact tried by a jury. *Parrott*, 17 P.3d at 482, *citing Van Lom v. Schneiderman*, 210 P.2d 461, 470-71 (1949); *see Oberg* (federal), 512 U.S. at 427; *Cooper Industries*, 532 U.S. at 437 n.10. It is that conclusion that led the court to reject excessiveness review as a matter of state constitutional law, *id.*; *see* Or. Const., art. VII (amended), § 3 (prohibiting judicial reexamination of any "fact tried by a jury"), and it is that conclusion that shapes the "rational juror" review it grudgingly applies to federal due process challenges today. *Parrott*, 17 P.3d at 485.

But the conclusion is flatly at odds with this Court's own conclusion that a jury's determination of the appropriate amount of punitive damages to award, if any, is not a finding of fact. *Cooper Industries*, 532 U.S. at 437. Instead, it is an exercise of judgment and discretion about degrees of culpability, appropriate levels of punishment, and impacts on future conduct. There are no "facts" in the record that constrain this exercise of judgment and discretion. A court typically cannot determine what facts the jury found in setting a punitive damages amount, or how

particular facts weighed in the jury's deliberation. A jury's decision about punitive damages derives instead from the conclusions the jury draws about the egregiousness of the defendant's conduct and the level of punishment that it warrants. The Oregon Supreme Court has decreed that the jury's conclusions about these issues and the resulting punitive damages award must be permitted to stand as long as the evidence, viewed in the light most favorable to the verdict, would allow the jury to draw those conclusions.

This Court's decisions in *BMW* and *Cooper Industries* make clear that there is a constitutional limit on the size of punitive damages awards, and they set forth the standards for reviewing courts to apply in determining those limits. The "guideposts" established in *BMW* were intended to address the question left open in *Oberg*: "'the character of the standard that will identify unconstitutionally excessive awards' of punitive damages." *BMW*, 517 U.S. at 568, quoting *Oberg* (federal), 512 U.S. at 420. These guideposts – the reprehensibility of the defendant's conduct, the reasonableness of the relationship of the punitive damages to the harm suffered by the plaintiff, and comparable civil sanctions – require more than a review of the record in search of evidence to support the jury's punitive damages award. These guideposts require the court to exercise judgment about the reasonableness of punishment and the fairness of notice. They also require the court to consider some factors beyond the evidentiary record and other factors, such as the comparability of other sanctions, that the jury never considers. And the court must engage in this examination independently, without deference to a fictional rational juror, to "make[] certain that the punitive damages are reasonable in their

amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991).

Oregon courts do not provide the kind of independent and searching review of punitive damages awards that federal due process requires. By deferring to what a jury "could have found" about culpability and appropriate punishment, the Oregon court has sanctioned nothing less than a return to the pre-*Oberg* era when a jury verdict in Oregon was inviolate if the record contained any evidence whatsoever to support it. This deferential standard of review does not pass constitutional muster.

III. OREGON'S "RATIONAL JUROR" STANDARD CONFLICTS WITH THE STANDARD FOR PUNITIVE DAMAGES REVIEW APPLIED IN THE NINTH CIRCUIT

Oregon's "rational juror" standard of review conflicts with the standard for punitive damages review applied by the federal circuit in which Oregon lies. The Ninth Circuit accepts the binding precedent established by decisions of this Court and recognizes that federal due process requires plenary, independent and searching review of punitive damages awards applying the *BMW* standards and guideposts as a matter of law. *See, e.g., Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1148 (9th Cir. 2002) (applying "independent review" of punitive damages in Oregon case); *In re the Exxon Valdez*, 270 F.3d 1215, 1240 (9th Cir. 2001) (applying "independent review" standard). Thus, defendants in Oregon are subject to two very different standards of punitive damages review depending on whether the punitive damages are awarded

in state or federal court. This Court should grant certiorari in this case to resolve this conflict.

CONCLUSION

Despite this Court's direction and guidance, the Oregon Supreme Court's atavistic standard for the review of punitive damages has created an unconstitutional precedent that lower courts in Oregon are bound to follow. In the instant case, the Oregon Court of Appeals affirmed a $22.5 million punitive damages award – 45 times the generous compensatory damages awarded – to a doctor who effectively misdiagnosed the plaintiff's condition, and then colluded with the plaintiff to blame the defendant-drug manufacturer. The appellate court ignored this Court's teachings in *BMW* and *Cooper Industries*, and instead applied the "rational juror" standard of review to affirm this enormous and disproportionate jury award of punitive damages. Until this Court intervenes, Oregon will continue to deprive parties of constitutionally adequate review of punitive damages awarded by juries. This Court should accept this opportunity to bring punitive damages review in Oregon in line with the federal Constitution. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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